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EVIDENCE IN THE LITIGATION PROCESS:

A COURSEBOOK IN LAW

edited by

Stanley A. Schiff

Professor, Faculty of Law
University of Toronto

FOR USE ONLY BY STUDENTS
IN THE FACULTY OF LAW,
UNIVERSITY OF TORONTO

Draft edition, 1970

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PREFACE

This is a coursebook for law students about the presentation and use of information in the modern common law litigation process. For several reasons, I have chosen this description, and the title of the book which synthesizes it, rather than the usual label, "Cases and Materials on the Law of Evidence". First of all, I want to point up the special ways in which the demands of the litigation process shape presentation and use of information, rendering misleading invidious comparisons with techniques of fact-finding in the research sciences or humanities, or in commercial relationships. Secondly, I want to emphasize that the pertinent legal doctrine must be understood (and fashioned) with a constant eye to the process which alone gives it meaning. Thirdly, the book canvasses problems of trial and appellate procedure and judicial use of information in law-making which perhaps have been outside the classic bounds of "evidence law". And finally, the format of the book gives considerably more overt direction to lines of analysis than is common in law casebooks.

The bulk of the legal doctrine explored here is judge-made law. It has been hammered out by many generations of judges to solve the particular concrete problems presented to them as they have presided at trials, and by their appellate court brothers sitting in review of their work. This judicial law-making continues -- at least in some areas of trial administration -- to this day.

Only a small part of the pertinent legal doctrine is statutory, and in none of the older Dominions of the British Commonwealth nor in England has the doctrine been rendered into generally-applicable legislative codes. To be sure, there has been legislative amendment but it has been piecemeal and fragmentary. In England (with Canadian jurisdictions usually parroting some years later), the major statutory changes were made during the era of court reform in the 19th century. Those few changes which have been made since have each focussed on a specific problem. In this country, the statutory amendments are now for the most part gathered in the Evidence Acts of the various provinces and in the Canada Evidence Act passed by the federal

Parliament. Others are contained in rules of court such as the Supreme Court of Ontario Rules of Practice and Procedure (a title shortened in this book to "Ontario Rules of Practice" or simply "Ontario Rules"). For the sake of convenience, the Canada Evidence Act, as amended to date, has been reproduced as Appendix A to this book.

However, law reform is in the air -- in Ontario, in England, and in the United States.

To start with the United States: Backed by the extraordinary pioneer work of Professor James Bradley Thayer in the late 19th century and Dean John Henry Wigmore in the first forty years of the 20th, in 1942 the American Law Institute published the Model Code of Evidence as a substitute for their usual Restatement of the Law. In the view of the Institute (and their learned Reporter, Professor Edmund M. Morgan), the law of Evidence was so defective and in such state of confusion that a simple restatement was undesirable; only a systematic code which presented new solutions to recurrent problems would be satisfactory. But, mainly because of its revolutionary provisions, the Model Code has not been legislatively adopted anywhere and has had small impact on judicial decisions. In 1953, after four years' study (in which Professor Morgan assisted), the National Conference of Commissioners on Uniform State Laws approved and promulgated the Uniform Rules of Evidence, which were based upon the Model Code. Perhaps because the Uniform Rules depart much less from traditional doctrine, their influence in the United States has been more pervasive. The Rules have been approved by the American Bar Association; with some changes, they have been statutorily adopted in Kansas, the Canal Zone, and the Virgin Islands; and they have formed the basis for the New Jersey Rules of Evidence and the new California Evidence Code. Recently, an Advisory Committee, appointed by the Chief Justice of the United States, has published a draft of proposed Rules of Evidence for the United States District [Trial] Courts and Magistrates, based upon the Model Code, the Uniform Rules, and the evidence codes of New Jersey and California. (In Canada the overt influence of the Uniform Rules seems to have been limited to a plea by a knowledgeable law teacher that they should be carefully studied as a basis for legislative change here, and a cautionary rebuttal from another no less knowledgeable law teacher. Murray, Evidence: A Fresh Approach (1959), 37 CAN. B. REV. 576; Morton, Do We Need A Code Of Evidence? (1960), 38 CAN. B. REV. 35.)

Because the Uniform Rules of Evidence represent one of the best available accommodations between tradition and rational reform, reference is made to them throughout this book. Where there is no Uniform Rule on a point under discussion, reference is made to the relevant Model Code provision. For the sake of convenience, the Uniform Rules of Evidence have been reproduced as Appendix B.

In England, with the exception of statutory amendment of the hearsay rule in 1938, reform in the last half-century awaited reference during the 1950's of wholesale revision of evidence law to two committees -- one, to focus upon the law in criminal trials; the other, the law in civil trials. The first major fruits of their work was amending legislation passed in 1968. In the view of some critics, the wisdom of bifurcating reform here between criminal and civil trials is questionable.

In this country, during the 1940's the Conference of Commissioners on Uniformity of Legislation in Canada produced a draft Uniform Evidence Act, which attempted mainly to standardize the various provincial Evidence Acts. Except for the adoption of major parts for the Yukon and the North-West Territories, the influence of the Uniform Act has been minimal. Until recently, there was little other effort directed to reform of any kind. At present, under the auspices of the Ontario Law Reform Commission, a study directed to statutory amendment of evidence law in Ontario is proceeding under the direction of Professor A. W. Mewett, Faculty of Law, University of Toronto. However, except for recent amendments to the Canada Evidence Act, there appear to be no similar efforts in any other Canadian jurisdiction.

* * * * *

While some of the problems arise mainly on appeal, for the most part what this coursebook is concerned with is the stuff of the trial court. This is so for two reasons. First, a majority of the problems canvassed arise of a sudden during a trial. Viewed from the bench, the judge has a full trial list requiring expeditious conduct of all proceedings, and he expects counsel to argue the matters in concise fashion. Viewed from a jury-box, too many or too long interruptions for argument by counsel may hinder continuity of narration and

may engender a sense that "somebody is trying to hide something". Thus, trial counsel must analyze the problems quickly, determine whether objection is worth the candle, and be prepared to thrash out the point on the spot with the judge and his opponent. Secondly, while points of trial evidence and procedure are taken to appellate courts (more often in criminal than in civil cases), reversals on appeal for such errors at trial are not common.

As you grapple with these problems, you should always question, "From the point of view of what makes good trial administration, how would a capable trial judge decide this point?". In a wise little book, Professor John Maguire tells that his old teacher at the Harvard Law School, John Chipman Gray, always asked himself a similar question when dealing with evidence problems. J. M. MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 2 (1947). He commends the method to his readers. So do I.

* * * * *

Throughout the text of this book there are many references to court opinions, articles and books, and at the end of each chapter or section there is a list of articles or books for "Collateral Reading". The former are usually directed to illustrate or support the narrow point then under discussion. The latter serve as suggestions for outside readings of broader scope on the matters covered in the chapter or section. Often some of the references in the text might have served as well as a Collateral Reading.

There are numbers of books that you may find useful for general reading during the course. Several of these have been listed from time to time in the Collateral Readings, but you may wish to consult them beyond these references. I list here with comments those which I think are most useful, roughly in their order of merit for student use in Canada.

C. T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE (1954). American; thoughtful, lucid, and well-written; out-dated on the impact of recent American constitutional decisions on evidence law.

J. H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW, 10 volumes (3d ed., 1940), plus Volume 8 (McNaughton Revision, 1961). American; the great and profound repository of the Anglo-American law of evidence; constantly referred to by American judges, and sometimes by Canadian and English.

R. CROSS, EVIDENCE (3d ed., 1967). English; the most thoughtful and critical modern text on evidence law by an Englishman; currently quoted by English courts more often than other English texts.

E. M. MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION (1956). American; a book of essays on selected topics by a modern American master of the subject.

J. M. MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW (1947). American; a book of essays on selected topics written especially for law students by an articulate American authority.

Z. COWEN & P. B. CARTER, ESSAYS ON THE LAW OF EVIDENCE (1956). English; a book of critical essays on selected topics by an Australian and an English law teacher.

J. B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW (1898). American; despite its age, this great work is still illuminating, particularly for its historical resumé.

[1955] SPECIAL LECTURES OF THE LAW SOCIETY OF UPPER CANADA: EVIDENCE. Canadian; essays on selected topics by lawyers practising in Ontario, originally delivered as lectures in the Law Society's yearly series.

D. A. MACRAE, EVIDENCE (2d ed., 1952). Canadian; a revision of a book written originally as the article on evidence law in the Canadian Encyclopedic Digest, which suffers from the format.

September, 1970

Stanley Schiff,
Faculty of Law,
University of Toronto.

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